

SEP 22 1983

ALEXANDER L. STEVAS,
CLERK

In the Supreme Court

OF THE United States

OCTOBER TERM, 1983

CITY OF LOS ANGELES
DEPARTMENT OF WATER AND POWER,
Petitioner,

vs.

NATIONAL AUDUBON SOCIETY, a corporation;
FRIENDS OF THE EARTH, a corporation;
THE MONO LAKE COMMITTEE, a corporation;
and the LOS ANGELES AUDUBON SOCIETY, a corporation,
Respondents.

BRIEF OF RESPONDENTS STATE OF CALIFORNIA, ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN K. VAN DE KAMP
Attorney General of the
State of California

R. H. CONNETT
Assistant Attorney General

RODERICK E. WALSTON*

JAN S. STEVENS

M. ANNE JENNINGS

CLIFFORD T. LEE

BRUCE S. FLUSHMAN
Deputy Attorneys General
6000 State Building
San Francisco, Calif. 94102
Telephone: (415) 557-3920

*Attorneys for Respondents
State of California, et al.*

*Counsel of Record

TABLE OF CONTENTS

	<u>Page</u>
Statement of the case	1
1. The historical backdrop	1
2. The instant controversy	3
3. The lower decision	5
Summary of argument	6
I	
Argument	8
I	
The California Supreme Court decision is based on California law rather than federal law, and this court thus lacks jurisdiction to review the decision	8
II	
The lower decision does not violate the constitutional guaranty of due process of law	10
A. Standing	11
B. Ripeness	11
C. Merits	12
Conclusion	17

TABLE OF AUTHORITIES CITED

Cases

	<u>Page</u>
Agins v. City of Tiburon, 447 U.S. 255 (1980)	12
Barney v. Keokuk, 94 U.S. 324 (1877)	13
Board of Education v. Allen, 392 U.S. 236 (1968)	11
Broad River Co. v. South Carolina ex rel. Daniel, 281 U.S. 537 (1930)	13
California v. United States, 438 U.S. 645 (1978)	4
Cherry v. Steiner, 543 F.Supp. 1270 (D.Ariz. 1982)	13
City of South Lake Tahoe v. California Tahoe Re- gional Planning Agency, 449 U.S. 1039 (1980)	11
Demorest v. City Bank Farmers Trust Co., 321 U.S. 36 (1944)	13
Environmental Defense Fund v. East Bay Muni. Util. Dist., 26 Cal.3d 183 (1980)	4
Fox Film Corp. v. Muller, 274 U.S. 651 (1927)	8
Fox River Paper Co. v. Railroad Comm'n, 274 U.S. 651 (1927)	13
Goldblatt v. Hempstead, 369 U.S. 590 (1962)	11
Hardin v. Jordan, 140 U.S. 371 (1891)	12, 13
Herminghaus v. Southern California Edison Co., 200 Cal. 81 (1926)	3
Illinois Central R.R. Co. v. Illinois, 146 U.S. 387 (1892)	6, 7, 8, 9, 10
In re Waters of Long Valley Creek Stream Systems, 25 Cal.3d 339 (1979)	14
Jennison v. Kirk, 98 U.S. 453 (1878)	2
Joslin v. Marin Muni. Water Dist., 67 Cal.2d 132 (1967)	3, 14
Kaiser Aetna v. United States, 444 U.S. 164 (1979) ..	11, 12

TABLE OF AUTHORITIES CITED

CASES

	<u>Page</u>
Peabody v. City of Vallejo, 2 Cal.2d 351 (1935)	3, 14
Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978)	11
People v. Gold Run Ditch & Mining Co., 66 Cal. 138 (1884)	15
People v. Russ, 132 Cal. 102 (1901)	15
Shively v. Bowlby, 152 U.S. 1	13
Tulare Irrig. Dist. v. Lindsay-Strathmore Irrig. Dist., 3 Cal.2d 489 (1935)	2
United States v. Alpine Land & Reservoir Co., 697 F.2d 851 (9th Cir. 1983)	2
United States v. Central Eureka Mining Co., 357 U.S. 155 (1958)	11
United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950)	2

Constitution

California Constitution, Article X:

Section 2	3, 13
Section 5	14

United States Constitution:

Fifth Amendment	10
Fourteenth Amendment	7, 10

Statutes

California Water Code:

Section 1200 et seq.	4
Section 1253	4
Section 1255	4
Section 1257	4

TABLE OF AUTHORITIES CITED

Rule

	<u>Page</u>
Rule of Supreme Court, Rule 19.6	1

Other Authorities

Trelease, "The Concept of Reasonable Beneficial Use in the Law of Surface Streams," 12 Wyo. L.J. 1 (1956)	2
1 Hutchins, Water Rights Laws in the Nineteen West- ern States:	
192-200 (1971 ed.)	2
206-225 (1971 ed.)	2
1 Wiel, Water Rights in the Western States 65-172 (3d ed. 1911)	2

No. 83-300

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

CITY OF LOS ANGELES

DEPARTMENT OF WATER AND POWER,

Petitioner,

vs.

NATIONAL AUDUBON SOCIETY, a corporation;

FRIENDS OF THE EARTH, a corporation;

THE MONO LAKE COMMITTEE, a corporation;

and the LOS ANGELES AUDUBON SOCIETY, a corporation,

Respondents.

**BRIEF OF RESPONDENTS STATE OF CALIFORNIA,
ET AL., IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

STATEMENT OF THE CASE

This brief is filed by respondents State of California, the State Water Resources Control Board, and the State Lands Commission. All said respondents were parties below, Pet. for Cert. i, and hence are respondents in this action. Rule 19.6, Rules of the Supreme Court.

1. The Historical Backdrop

This case arises against the historical backdrop of western water law development. Long ago, in response to arid conditions prevailing in the West, the western states

adopted the doctrine of "prior appropriation" as their basic water rights law. See *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 742-752 (1950); *Jennison v. Kirk*, 98 U.S. 453, 456-459 (1878); 1 Wiel, *Water Rights in the Western States* 65-172 (3d ed. 1911). This doctrine replaces or modifies the riparian doctrine that prevailed under the English common law and that exists in most eastern states.¹ Under the appropriation doctrine, a water right exists to the extent that, and so long as, water is put to "reasonable and beneficial use" by the appropriator. *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 854 (9th Cir. 1983); *Tulare Irrig. Dist. v. Lindsay-Strathmore Irrig. Dist.*, 3 Cal.2d 489, 567-568 (1935); Trelease, "The Concept of Reasonable Beneficial Use in the Law of Surface Streams," 12 *Wyo. L.J.* 1, 14-17 (1956). The appropriation doctrine, which originated as a custom among the early miners, has been constitutionally or statutorily codified in the laws of all western states. See 1 Hutchins, *Water Rights Laws in the Nineteen Western States* 206-225 (1971 ed.). It is the fundamental doctrine of water law prevailing in the West today.

In 1913, the California Legislature codified the appropriation doctrine by enacting the California Water Commission Act, Cal. Water Code §§ 1200 *et seq.* This Act establishes the "reasonable and beneficial use" test as the measure of water rights, and creates a State agency—now known as the State Water Resources Control Board ("Water Board")—to administer the water rights system.

¹Some western states, such as California, have mixed water law doctrines, in that they recognize both appropriative and riparian rights. See 1 Hutchins, *Water Rights Laws in the Nineteen Western States* 192-200 (1971 ed.).

The California Supreme Court held in 1926 that the "reasonable and beneficial use" test does not apply to riparian rights in competition with appropriative rights. *Herminghaus v. Southern California Edison Co.*, 200 Cal. 81 (1926). In 1928, the people of California overrode the *Herminghaus* decision by enacting a constitutional amendment, now contained at Article X, Section 2 of the California Constitution, that establishes the "reasonable and beneficial use" test as the measure of *all* water rights in California, whether appropriative, riparian, or other. See *Joslin v. Marin Muni. Water Dist.*, 67 Cal.2d. 132, 138 (1967); *Peabody v. City of Vallejo*, 2 Cal.2d 351, 367 (1935). Additionally, the constitutional amendment provides that the Legislature shall adopt laws "in furtherance of the policy" contained in the amendment. The constitutional amendment, in conjunction with the California Water Commission Act, establishes a comprehensive water rights system in California.

2. The Instant Controversy

In 1934, the Los Angeles Department of Water and Power ("DWP") applied to the Water Board's predecessor for permits to appropriate water from Mono Lake basin for domestic use in DWP's service area. The permits were granted in 1940. In granting the permits, the Water Board determined that, since domestic water uses at that time were entitled to the highest priority under California water law, it lacked authority to balance Mono Lake's ecological values against DWP's domestic needs.² The Water

²In the mid-1950's the California Water Code was substantially amended to authorize the Water Board, in granting water rights, to weigh and consider instream values—such as recreation and biological needs—in relation to consumptive use needs, and to grant

Board subsequently granted appropriative licenses to DWP in 1974, after DWP had built the diversion works and fully applied the water diversions to DWP's service area.

In 1981, the National Audubon Society ("Audubon") brought an action in a California court against DWP and the State of California, *et al.* ("State"), seeking a declaration, *inter alia*, with respect to the question whether the public trust doctrine can be invoked in actions involving review of DWP's licenses and permits.³ Audubon argued that the public trust doctrine prohibits DWP from diverting water from Mono Lake basin to the detriment of

such rights only if they are in the "public interest." Cal. Water Code §§ 1253, 1255, 1257. Pursuant to this authority, the Water Board now fully weighs and considers environmental values in issuing water rights permits. See, *e.g.*, *California v. United States*, 438 U.S. 645, 652 n. 7 (1978); *Environmental Defense Fund v. East Bay Muni. Util. Dist.*, 26 Cal.3d 183, 198 (1980).

³In 1979, Audubon filed an earlier action against DWP in a California court, alleging that the public trust doctrine, in itself, bars DWP from diverting water from Mono Lake basin that impairs public trust values in the basin. DWP filed a cross-complaint naming 117 cross-defendants who claimed water rights in Mono Lake basin. The cross-defendants included the State of California—named in its capacity as trustee of the public trust and administrator of the State water rights system—and the United States, which holds water rights in Mono Lake basin. The United States removed the action to federal court. The federal court, *sua sponte*, abstained from determining (1) the relationship between the public trust doctrine and the California water rights laws and (2) whether Audubon is required to exhaust its administrative remedies before the Water Board. Pet. App. 61. Audubon then brought another action in the State courts for declaratory judgment with respect to these two issues, and the California Supreme Court ultimately decided these issues. With respect to the second issue, the California Supreme Court held that the plaintiffs are not required to exhaust their administrative remedies before the Water Board.

ecological values in the basin, even though the diversions are authorized by water rights permits and licenses issued under California water rights laws. In reply, DWP argued that the public trust doctrine cannot be invoked to challenge DWP's water rights, because the water rights laws provide the exclusive measure of water rights and the sole remedy for challenging such rights. According to DWP, the water rights laws provide DWP with a "vested" water right and thus do not authorize reconsideration of DWP's rights in light of modern public needs. The State agreed with DWP that the water rights laws provide the exclusive measure of, and sole basis for challenging, water rights in California. The State argued, however, that the water rights laws incorporate the public trust doctrine, thus requiring the State to consider public trust values in determining the "reasonable and beneficial use" of water. The State also argued that the constitutionally-mandated "reasonable and beneficial use" test, both by its own force and by incorporating the public trust doctrine, authorizes the State to reconsider DWP's water rights in light of changing public needs.

3. The Lower Decision

The California Supreme Court ruled that the public trust doctrine can be invoked to challenge DWP's licenses and permits. 33 Cal.3d 419 (1983); Pet. App. 1-58. The Court, describing the effect of the public trust doctrine in the water rights context, stated:

(a) The State "as sovereign retains continuing supervisory control" over navigable waters, thus preventing permittees and licensees "from acquiring vested rights" in such waters;

(b) The State, through the Legislature or the Water Board, has the right to authorize water diversions that impair public trust uses;

(c) The State must "take the public trust into account" in granting water rights, and must "protect public trust uses whenever feasible;" and

(d) The State, after granting water rights, has "a duty of continuing supervision" over the rights, and "is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs." Pet. App. 39-41.

In effect, the lower decision holds that the public trust doctrine allows the State to reconsider DWP's water rights in light of current public needs, and requires the State to "consider" public trust values in granting water rights and to protect such values where "feasible." The decision also holds that, as a result of the "reasonable and beneficial use" test contained in the California Constitution, "all uses of water, including public trust uses, must now conform to the standard of reasonable use." Pet. App. 35. Thus, in effect, the decision holds that the public trust doctrine is incorporated in the constitutional test.

SUMMARY OF ARGUMENT

I

In California's view, the primary issue posed in the petition is whether the California Supreme Court decision gives rise to federal issues over which this Court has jurisdiction. The petitioner, asserting that the decision gives rise to federal issues, argues that the decision relies primarily on this Court's decision in *Illinois Central R.R. Co. v. Illinois*,

146 U.S. 387 (1892), which, according to the petitioner, decides issues of federal law. In California's view, the lower decision resolves issues of California law only, and relies on *Illinois Central* only as articulating principles that apply under California law. Since the lower decision resolves issues of California law, this Court lacks jurisdiction to review the decision to that extent.

II

The petitioner also argues that the lower decision, by holding that the petitioner's water uses are subject to modification under the public trust doctrine, deprives the petitioner of property without due process of law in violation of the Fourteenth Amendment of the United States Constitution. The question posed is whether the petitioner has vested "property" rights within the meaning of the Fourteenth Amendment, not whether its rights have been unconstitutionally "taken." This Court has consistently held that the definition of constitutionally-protectible "property" interests depends solely on state law, subject only to the qualification that state law must rest on a "fair or substantial basis."

The decision, as respondents State of California, *et al.*, interpret it, rests on a "fair or substantial basis." The decision holds that the public trust doctrine is incorporated in California's constitutional water rights system, in the sense that public trust values are considered in relation to other values in determining the "reasonable and beneficial use" of water. In past decisions, the California Supreme Court has held that the "reasonable and beneficial use" test is the measure of water rights in California, that the test

applies to all water rights in California, and that the test affords a basis for reconsidering water rights on the basis of changing public needs. Thus, the lower decision, by holding that public trust values must be considered within rather than outside the framework of this constitutional system, rests on a "fair or substantial basis."

ARGUMENT

I

THE CALIFORNIA SUPREME COURT DECISION IS BASED ON CALIFORNIA LAW RATHER THAN FEDERAL LAW, AND THIS COURT THUS LACKS JURISDICTION TO REVIEW THE DECISION

The decision below holds that, as a matter of State law, the public trust doctrine provides a basis for review of permits and licenses granted under State water rights laws, and thus that the State can revoke or modify such permits or licenses as necessary for the protection of changing public needs. The immediate question is whether the decision gives rise to federal issues over which this Court has jurisdiction. This Court lacks jurisdiction to review State court decisions based on adequate non-federal grounds, since any resulting opinion would be advisory and hence beyond the Court's jurisdiction. See, *e.g.*, *Fox Film Corp. v. Muller*, 274 U.S. 651 (1927). Since the decision here is based on adequate non-federal grounds, this Court lacks jurisdiction to review it.

The petitioner argues that the lower decision rests primarily on this Court's decision in *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892), and that *Illinois Central*

adopted federal common law. Pet. for Cert. 18-23. Indeed, the petitioner notes that the lower decision cites *Illinois Central* as the "primary authority" for the public trust doctrine. *Id.*, at 18; Pet. App. 24. In effect, the petitioner argues that the lower decision is based on, but misinterprets and misapplies, the federal common law.

In California's view, the lower decision is based on California law rather than federal law, and the decision relies on *Illinois Central* only as articulating principles that are incorporated in California law. The case reached the California Supreme Court only after a federal court abstained from considering the public trust issues. The federal abstention order was based on the fact that the case involved important issues of *California* law that should be initially determined by the courts of California. It is inconceivable that the federal district court would have abstained if the case had not raised important state issues. And, the California Supreme Court clearly understood that, as a result of the federal abstention order, the Court was deciding issues of California law. According to the Court, the federal district court abstained with respect to "two important issues of California law," Pet. App. 15, one of which was the relationship of the public trust doctrine and the California water rights system. The Court also commented that the federal abstention order allowed the California courts "to decide unsettled questions of California law" Pet. App. 16 n. 14.

Further, the lower decision's substantive analysis strengthens the conclusion that the California court was deciding issues of California law. The decision declares that its objective is to reach an "accommodation" between

the public trust doctrine and the State water rights laws. *Id.*, at 39. After analysis of both legal doctrines, the decision concludes that the doctrines "are parts of an integrated system of water laws." *Id.*, at 50. If the public trust doctrine were based on federal law rather than California law, the California Supreme Court surely would have ruled that federal law preempts California law, and would not have reached an "accommodation" that results in an "integrated" water law system. Finally, the decision, in analyzing the public trust doctrine, expressly describes the doctrine "in California," *id.*, at 18, and relies largely on California cases describing the effect of the doctrine, *id.*, at 19-23, 26-30. Indeed, the decision notes that earlier decisions of the California Supreme Court "indorsed the *Illinois Central* principles," *id.*, at 26, thus indicating that these earlier decisions did not consider that *Illinois Central* had a preemptive effect on California law.

Therefore, the lower decision articulates principles of California law rather than federal law, and, to this extent, this Court lacks jurisdiction to review the decision.

II

THE LOWER DECISION DOES NOT VIOLATE THE CONSTITUTIONAL GUARANTY OF DUE PROCESS OF LAW

DWP argues that the lower decision, by holding that DWP's rights can be reconsidered under the public trust doctrine, deprives DWP of property without due process of law in violation of the Fourteenth Amendment of the United States Constitution. Pet. for Cert. 23-27. The Fourteenth Amendment provides that a person cannot be "deprived" of "property" without due process of law, and the Fifth Amendment provides that "private property" cannot

be "taken" without payment of compensation. See, e.g., *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123-124 (1978); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958). DWP's argument is based solely on the Fourteenth Amendment, not the "taking" clause of the Fifth Amendment.

A. Standing

It is questionable whether a city has standing to argue that state action results in a deprivation of property without due process of law. In *City of Trenton v. New Jersey*, 262 U.S. 182 (1923), this Court held that municipalities cannot assert due process claims against state legislative acts. The petitioners, without citing any authority, attempt to distinguish *Trenton* on grounds that the present case involves state judicial rather than legislative action. Pet. for Cert. 26 n. 9. This may be a distinction without a difference. But see *Board of Education v. Allen*, 392 U.S. 236 (1968); *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 449 U.S. 1039, 1041-1042 (1980) (White, J., dissenting).

B. Ripeness

In conventional due process cases, it is assumed that "property" rights exist, and the question is whether such rights have been "taken" without due process of law. In determining the "taking" issue, this Court balances the "economic impact of the regulation," particularly in terms of whether the regulation "has interfered with distinct investment-backed expectations," against the "character of the government action." *Penn Central*, 438 U.S. at 124;

Kaiser Aetna, 444 U.S. at 174-175. It is impossible to determine the "economic impact" of the lower decision upon DWP's licenses and permits, since the decision merely subjects them to reconsideration and does not actually result in a diminution of them. Hence, it is premature to consider the "taking" issue at this time. See *Agin v. City of Tiburon*, 447 U.S. 255, 262-263 (1980).

DWP, however, does not assert that its rights have been unconstitutionally "taken" within the meaning of the Fifth Amendment. Rather, it asserts that the lower decision, by subjecting DWP's rights to reconsideration under the public trust doctrine, improperly defines DWP's "property" interests within the meaning of the Fourteenth Amendment. Thus, the issue is the nature of DWP's "property" rights, not whether its rights have been unconstitutionally "taken." Although it is clearly premature to determine the taking issue, since the "economic impact" on DWP's rights has not yet been determined, it is less clear whether it is premature to determine the nature of DWP's "property" interests within the meaning of the Fourteenth Amendment. Although, as we explain below, the petition does not appear to give rise to a cognizable due process issue, it may be appropriate for the Court to defer consideration of any such issue until DWP's rights are actually diminished, if they are diminished at all.

C. Merits

This Court has consistently held that the states are free to develop and apply their own rules of property, and thus to define the nature of "property" interests in navigable waters and underlying soils. See, e.g., *Hardin v. Jordan*,

140 U.S. 371, 382-383 (1891); *Barney v. Keokuk*, 94 U.S. 324, 338 (1877); *Shively v. Bowlby*, 152 U.S. 1, 14, 18-26, 57-58; *Fox River Paper Co. v. Railroad Comm'n*, 274 U.S. 651, 654 (1927). Thus, although the Due Process Clause limits the extent to which states can impair "property" rights, state law determines whether the complainant has "property" within the meaning of that clause. The only limitation is that state law, in defining "property," must rest on a "fair or substantial basis" so that there is "no evasion of the constitutional issue." See *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42 (1944); *Broad River Co. v. South Carolina ex rel. Daniel*, 281 U.S. 537, 540 (1930); *Fox River*, 274 U.S. at 655.

The lower decision rests on a "fair or substantial basis." The decision holds that the public trust doctrine is incorporated in the "reasonable and beneficial use" test established under Article X, Section 2 of the California Constitution. Under this result, public trust values, such as navigation and fisheries, are not considered in a vacuum. Rather, they are considered in relation to other values, such as economic and municipal values, in determining whether a particular water use is "reasonable and beneficial." Indeed, the decision expressly states that, as a result of the constitutional test, "all uses of water, including public trust uses, must now conform to the standard of reasonable use." Pet. App. 35. Such a standard cannot be characterized as an unconstitutional redefinition of property rights. See *Cherry v. Steiner*, 543 F.Supp. 1270 (D.Ariz. 1982).

In several prior cases, the California Supreme Court has held that the constitutionally-mandated "reasonable

and beneficial use" test is the "measure of a water right" in California. See *Joslin v. Marin Muni. Water Dist.*, 67 Cal.2d 132, 138 (1967); *Peabody v. City of Vallejo*, 2 Cal. 2d 351, 367 (1935). The Court has also held that the "reasonable and beneficial use" test affords a basis for reconsidering water rights. See *Joslin*, 67 Cal.2d at 140-141; *In re Waters of Long Valley Creek Stream System*, 25 Cal.3d 339, 351-354 (1979). In *Joslin*, for example, the Court invoked this test in holding that a downstream riparian user using water for gravel washing purposes lacked a prior right as against an upstream municipal water district diverting water for local domestic purposes, even though the downstream riparian use existed long before the upstream municipal use. Similarly, in *Long Valley Creek Stream System*, the Court held that this test applies to riparian water users even though their rights predated the adoption of the test by constitutional amendment in 1928. Indeed, Article X, Section 5 of the California Constitution expressly provides that an appropriate water use is a "public use" that is "subject to the regulation and control of the state, in the manner to be prescribed by law." Thus, the California constitutional system, as interpreted by the California Supreme Court in past cases, provides the measure of water rights in California, and allows reconsideration of such rights on the basis of changing public needs. The petitioner is thus wrong in arguing that California's water rights laws establish "vested, permanent property rights immune from reduction or termination" Pet. for Cert. 14. The lower decision, in holding that public trust values must be measured against other values in determining the "rea-

sonable and beneficial use" of water, thus unequivocally rests on a "fair or substantial basis."

Clearly the state has a legitimate interest in allocating, and if necessary reallocating, its sparse water resources among important public needs, particularly where the needs served by past allocations are no longer consistent with the public interest. In the West, where water is in short supply, it is economically prohibitive for the state to pay compensation to water rights holders whose rights have become anachronistic in light of modern public needs. Thus, unless the state has the right to make reallocations without the payment of compensation, water resource allocation in the modern West would primarily depend on

⁴This conclusion is also supported by this Court's decision in *Fox River Paper Co. v. Railroad Comm'n*, 274 U.S. 651 (1927), which is one of the cases on which the petitioner relies. The case dealt with the power of a state to condition a license for dam construction or repair upon the right to take over the improvements under specified conditions. This Court, applying Wisconsin law, held that riparian water rights are subordinate to state control of navigable waters, and that the Fourteenth Amendment interposes no obstacle to such state control. The Court stated:

"It is for the state in cases such as this to define rights in land located within the state, and the Fourteenth Amendment, in the absence of an attempt to forestall our review of the constitutional question, affords no protection to supposed rights of property which the state courts determine to be non-existent." 274 U.S. at 657.

The long-standing California rule is clearly consistent with the Wisconsin rule enunciated in *Fox River*, since independent judicial review of diversions affecting navigable waters has been available in California since its earliest days. See, e.g., *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138 (1884) (hydraulic mining impairing navigation and causing flood and pollution nuisance downstream); *People v. Russ*, 132 Cal. 102 (1901) (dams on sloughs adjoining navigable river).

historical patterns of use rather than modern public needs. The Due Process Clause does not, we believe, place a straitjacket around the state in its effort to put its water resources to the best possible public use. Therefore, the holders of water rights cannot reasonably except that the state will not reallocate its water supplies as public needs change from one generation to the next.⁵

⁵A different and more difficult question might be presented if the lower decision had held that the public trust necessarily exists independently of, and establishes criteria different than, any "reasonable and beneficial use" test established under the California Constitution, a result which would imply that the people lack the power to modify the public trust by state constitutional amendment. Under such circumstances, a common law doctrine would be deemed to override an explicit state constitutional provision relating to water regulation and use. We are not aware that any state court has ever applied common law under these circumstances. Such an application of the common law might arguably interfere with the right of the people to constitutionally regulate and allocate their water resources, and might arguably interfere with the reasonable expectations of water rights holders that their rights will be governed by the state constitutional system. Since the lower decision does not reach this result, it is unnecessary for this Court to determine whether such a result would lack a "fair or substantial basis."

CONCLUSION

For the reasons expressed herein, it is respectfully submitted that this Court should deny the petition for writ of certiorari.

Dated: September 20, 1983.

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General of the
State of California

R. H. CONNETT
Assistant Attorney General

JAN S. STEVENS

M. ANNE JENNINGS

CLIFFORD T. LEE

BRUCE S. FLUSHMAN
Deputy Attorneys General

By RODERICK E. WALSTON

Deputy Attorney General
Attorneys for Respondents
State of California, et al.